

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

PUGET SOUNDKEEPER ALLIANCE,)	
)	No. 3:07-CV-05616-RJB
Plaintiff,)	
)	CONSENT DECREE
v.)	
)	
BROWN-MINNEAPOLIS TANK)	
NORTHWEST, LLC,)	
)	
Defendant.)	

WHEREAS, Plaintiff Puget Soundkeeper Alliance filed a Complaint against Defendant Brown-Minneapolis Tank Northwest, LLC on November 8, 2007, alleging violations of the Clean Water Act, 33 U.S.C. § 1251 et seq., relating to discharges of stormwater from Defendant's facility located in Olympia, Washington, seeking declaratory and injunctive relief, civil penalties and attorneys fees and costs ("Complaint");

WHEREAS, Defendant denies Plaintiff's claims and any liability for the alleged violations; and

WHEREAS, counsel for the parties to this action have engaged in discussions relating to
CONSENT DECREE - 1
No. 3:07-CV-05616-RJB

SMITH & LOWNEY, P.L.L.C.
2317 EAST JOHN STREET
SEATTLE, WASHINGTON 98112
(206) 860-2883

1 the potential settlement of this litigation; and

2 WHEREAS, Defendant has undertaken, and is implementing, measures to further ensure
3 compliance with the Clean Water Act and its National Pollutant Discharge Elimination System
4 Permit for its facility and to address issues raised in the August 22, 2007 Notice of Intent to Sue
5 (“Notice”) mailed by Plaintiff; and
6

7 WHEREAS, Defendant is in the process of moving its operations from the current
8 Olympia facility to a facility located in Elma, Washington, and anticipates that this move will be
9 completed by December 31, 2008; and
10

11 WHEREAS, Plaintiff and Defendant agree that settlement of these matters is in the best
12 interest of the parties and the public, and that entry of this Consent Decree without additional
13 litigation is the most appropriate means of resolving this action; and
14

15 WHEREAS, Plaintiff and Defendant, by their authorized counsel and without trial or final
16 adjudication of the issues of fact or law, with respect to Plaintiff's claims or allegations, consent to
17 the entry of this Consent Decree in order to avoid the risks of litigation and to resolve the
18 controversy between them.
19

20 NOW THEREFORE, without trial of any issue of fact or law, and without admission by
21 the Defendant of the facts or violations alleged in the Complaint or Notice, and upon consent of
22 the parties, and upon consideration of the mutual promises herein contained, it is hereby
23

24 ORDERED, ADJUDGED AND DECREED as follows:

- 25 1. The recitals set forth above are incorporated herein as if set forth fully below.
26 2. This Court has jurisdiction over the parties and subject matter of this action.
27 3. The undersigned representative for each party certifies that he or she is fully
28

1 authorized by the party or parties whom he or she represents to enter into the terms and
2 conditions of this Consent Decree and to legally bind the party or parties and their successors in
3 interest to it.

4 4. This Consent Decree shall apply to, and be binding upon, the parties, and upon the
5 successors and assigns of the parties.
6

7 5. This Consent Decree shall apply to Defendant's operation and/or oversight of its
8 facility located at or about 1218 W. Bay Drive NW, Olympia, Washington 98502 (the "facility").
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10 6. This Consent Decree constitutes a full and complete settlement of the claims
11 alleged in the Complaint in this case, Notice, and all other claims known and unknown existing as
12 of the date of entry of this Consent Decree, that could be asserted under the Clean Water Act, 33
13 U.S.C. §§ 1251-1387 or related to the Defendant's National Pollutant Discharge Elimination
14 System Permit, arising from operations of the facility identified in paragraph 5 of this Consent
15 Decree.
16

17 7 This Consent Decree shall not constitute evidence in any proceeding, an admission
18 or adjudication with respect to any allegation of the Complaint or Notice, any fact or conclusion
19 of law with respect to any matter alleged in or arising out of the Complaint or Notice, or the
20 admission or evidence of any wrongdoing or misconduct on the part of the Defendant or its
21 successor.
22

23 8. In full and complete satisfaction of the claims covered by the Complaint and
24 Notice, and all other claims covered by this Consent Decree, as described in Paragraph 6,
25 Defendant agrees to abide by and be subject to the following terms and conditions:
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27
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1 a. Defendant shall comply fully with all conditions of its National Pollutant
2 Discharge Elimination System Permit No. SO3-004476 and any successor, modified, or
3 replacement permit (the “NPDES Permit”) until it is lawfully terminated pursuant to the terms and
4 conditions of the NPDES Permit;

5 b. Upon entry of this Consent Decree, and irrespective of the stormwater
6 monitoring frequency required under the Defendant’s NPDES Permit, Defendant shall collect
7 stormwater samples in the manner specified by its stormwater pollution prevention plan and the
8 NPDES Permit on a monthly basis and have such samples analyzed for the pollutant parameters
9 required by the NPDES Permit. For the purposes of this subparagraph, Defendant need not
10 collect stormwater samples in months when precipitation is insufficient to generate a stormwater
11 discharge from the facility. The results of all such monitoring shall be reported to the Washington
12 Department of Ecology on Discharge Monitoring Reports. Defendant shall continue such
13 stormwater monitoring until Defendant’s NPDES Permit is lawfully terminated under the terms of
14 the NPDES Permit;

15 c. Defendant shall retain its stormwater consultant Matt Dalton to develop
16 best management practices to minimize stormwater contamination at the facility caused by
17 Defendant moving its operations from the facility. Defendant shall fully implement the best
18 management practices recommended by Mr. Dalton throughout the process of Defendant moving
19 its operations from the facility;

20 d. Upon entry of this Consent Decree, Defendant shall retain its stormwater
21 consultant Matt Dalton to conduct monthly visual inspections of the facility to verify that the best
22 management practices described in the facility’s stormwater pollution prevention plan and
23

recommended by Mr. Dalton pursuant to the provisions of subparagraph 8.c of this Consent Decree are fully implemented. Such monthly visual inspections shall continue until Defendant has completely moved its operations from the facility;

e. Defendant shall, until such time as Defendants' NPDES Permit for the facility is lawfully terminated under the terms of the NPDES Permit, forward copies to Plaintiff of all written or electronic communications between Defendant and the Washington Department of Ecology concerning Defendant's compliance with the NPDES Permit and the Clean Water Act, including but not limited to Discharge Monitoring Reports, Level One, Two, or Three response reports or similar reports produced pursuant to a successor permit, correspondence, and inspection reports. During this same period Defendant shall additionally forward copies to Plaintiff of all inspection reports and checklists of all visual monitoring conducted at the facility pursuant to the NPDES Permit and subparagraph 8.d of this Consent Decree. All copies shall be forwarded to Plaintiff on a monthly basis and not later than the fifteenth day following the end of each month;

9. Not later than thirty days after the date of entry of this Consent Decree, Defendant shall make a payment in the amount of \$30,000 (THIRTY THOUSAND DOLLARS) to the Nature Conservancy for the North Bay Oyster Restoration Project that is described in Attachment A to this Consent Decree. Such payment shall be made by check payable and mailed to the Nature Conservancy, 1917 First Avenue, Seattle, WA 98101, Attn: Betsy Lyons, and bear the notation "Clean Water Act Settlement," with a copy to Plaintiff;

10. Not later than thirty days after the date of entry of this Consent Decree, Defendant shall pay Plaintiff's reasonable attorney fees and costs in the amount of \$15,000 (FIFTEEN

1 THOUSAND DOLLARS) by check payable and mailed to Smith & Lowney, PLLC, 2317 East
2 John St., Seattle, WA 98112, attn: Knoll Lowney, in full and complete satisfaction of any claims
3 Plaintiff may have pursuant to the Complaint, the Notice, under the Clean Water Act, and/or the
4 NPDES Permit for fees and costs.

5
6 11. The Court shall retain jurisdiction over this matter and allow this case to be
7 reopened without filing fee for the purpose of enabling the parties to apply to the Court for any
8 further order that may be necessary to construe, carry out, enforce compliance and/or resolve any
9 dispute regarding the terms or conditions of this Consent Decree until termination of the Consent
10 Decree per paragraph 13. In the event of a dispute regarding implementation of, or compliance
11 with, this Consent Decree, the parties shall first attempt to informally resolve the dispute through
12 meetings between the parties by serving written notice of request for resolution to the parties and
13 their counsel of record. If no resolution is reached within thirty (30) days from the date that the
14 notice of dispute is served, the parties may resolve the dispute by filing motions with the court.
15

16
17 12. The parties recognize that no consent judgment can be entered in a Clean Water
18 Act suit in which the United States is not a party prior to 45 days following the receipt of a copy
19 of the proposed consent judgment by the U.S. Attorney General and the Administrator of the U.S.
20 EPA pursuant to 33 U.S.C. § 1365(c)(3). Therefore, upon the signing of this Consent Decree by
21 the parties, Plaintiff shall serve copies of it upon the Administrator of the U.S. EPA and the
22 Attorney General.
23

24
25 13. This Consent Decree shall take effect on the date it is entered by the Court. This
26 Consent Decree shall terminate sixty (60) days following completion of all obligations under it.
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14. This Consent Decree may be modified only upon the written consent of the parties and the approval of the Court.

15. If for any reason the Court should decline to approve this Consent Decree in the form presented, this Consent Decree and the settlement embodied herein shall be voidable at the sole discretion of either party. The parties agree to continue negotiations in good faith in an attempt to cure any objection raised by the Court to entry of this Consent Decree.

16. Notifications or copies required by this Consent Decree to be made to Plaintiff shall be mailed to :

Sue Joerger
Puget Soundkeeper Alliance
5309 Shilshole Ave., #215
Seattle, WA 98107


Mark DeMoss and Rollie Irwin
Brown-Minneapolis Tank, Northwest, LLC
1218 West Bay Drive NW,
Olympia, Washington 98502

Dated and entered this 2nd day of December, 2008

Robert Bryan

ROBERT J. BRYAN
United States District Judge

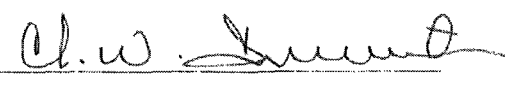
1 PUGET SOUNDKEEPER ALLIANCE

2 Signature: 

3 Title: Executive Director

4 Dated: 9/25/08

5 BROWN-MINNEAPOLIS TANK NORTHWEST, LLC

6 Signature: 

7 Title: PRESIDENT

8 Dated: SEPTEMBER 16, 2008

September 12, 2008

Katie Kolarich
Program Coordinator
Puget Soundkeeper Alliance
5309 Shilshole Ave. NW, Suite 215
Seattle, WA 98107

Re: Puget Soundkeeper Alliance v. Brown-Minneapolis Tank Northwest, LLC
North Bay Oyster Restoration Project

Dear Ms. Kolarich:

The Nature Conservancy greatly appreciates the support of the Puget Soundkeepers Alliance in our efforts to restore native oyster habitat in North Bay.

The Nature Conservancy has reviewed the draft consent decree in the matter of Puget Soundkeeper Alliance v. Brown-Minneapolis Tank Northwest, LLC and will review the final consent decree once entered by the Court. The Nature Conservancy has agreed to accept \$30,000 from Brown-Minneapolis Tank Northwest, LLC as part of the settlement in the above-referenced matter, and will use such funds for its North Bay Oyster Restoration project. The Nature Conservancy will not use any money it receives under the consent decree for political lobbying activities. The Nature Conservancy will submit a letter to the Court, Department of Justice, and the parties, describing how the funds have been spent.

Should you have any questions regarding this letter or the North Bay Oyster Restoration Project, please contact Betsy Lyons, Marine Conservation Project Manager, at 206.343.4345 x340 or via email at blyons@tnc.org.

Sincerely,



Maggie Coon
Acting Washington State Director

**Proposal submitted to the Puget Soundkeeper Alliance
by The Nature Conservancy (August 15, 2008)**

Project Title: North Bay Oyster Restoration

Applicant Organization: The Nature Conservancy

Mission Statement: The Nature Conservancy's mission is to preserve the plants, animals and natural communities that represent the diversity of life on Earth by protecting the lands and waters they need to survive.

Contact/Title: Betsy Lyons, Marine Conservation Project Manager

Mailing address: 1917 First Avenue, Seattle, WA 98101

Phone number: (206) 343-4345 x340

Email address: blyons@tnc.org

Website address: www.nature.org

Organization Budget for 2007: \$11,446,038 – FY08 (July 1, 2007 – June 30, 2008) Operating Budget for
The Nature Conservancy's Washington Field Office

Amount requested: \$30,000

501 (c) (3) Status: Yes

PROJECT SUMMARY

1. Purpose, rationale, and need for the project.

This project will restore and monitor 1/2 acre of habitat for native Olympia oysters (*Ostrea conchaphila*) in N. Bay, South Puget Sound. Olympia oysters were once an important part of the aquatic ecosystem in the South Sound. In areas where they occurred, they filtered large volumes of water, were likely the largest contributor to the benthic community biomass, provided an important food source for other species and contributed to the structural complexity of the site. Since the major die-offs in the 1930s, it is likely that much of the natural substrate (Olympia oyster shell) throughout the South Sound has since been covered by sediments and decaying plankton or displaced by aquaculture or other development. We now have the opportunity to enhance habitat for this culturally and ecologically important species and with it to improve the diversity and health of the marine nearshore environment. Through this project we will be able to refine the methodology needed to conduct oyster restoration at a scale that could provide measurable water quality benefits.

The restoration site is located near Sherwood Creek in North Bay. Its proximity adjacent to the largest native oyster population in the South Sound makes it a prime site for habitat enhancement and greatly increases the likely success of this project in attracting native oyster larvae and expanding the footprint of the native oyster population. Earlier in 2008, staff from WA Dept. of Fish and Wildlife (WDFW), Puget Sound Restoration Fund (PSRF), The Nature Conservancy (TNC) and SeaGrant participated in an inventory of this site and identified Sherwood Creek as an optimal area for habitat enhancement.

The tidelands at the site are owned by WDFW and were formerly owned by the Coast Oyster Company. A Memorandum of Agreement would be obtained by PSRF from WDFW. The area is close to being permanently closed, so human activity is limited and there is a significant need for water quality improvements.

The conceptual model upon which our restoration is based assumes that substrate is the limiting factor for natural recruitment by native oysters. ***Our conservation plan centers on restoring suitable substrate for natural recruitment to areas that historically supported Olympia oysters and where larvae are currently available.*** Our project design is informed by work already completed by The Nature

Conservancy (TNC) and PSRF, and the Washington Department of Fish and Wildlife's (WDFW) *Olympia Oyster Stock Rebuilding Plan* which calls for habitat improvements.

Partners Involved

This project is being implemented in partnership with Puget Sound Restoration Fund and with technical expertise from WDFW. Landowners and volunteers will be recruited to assist with restoration and monitoring. The project will also be highlighted on MudUp.org—the website for a public engagement campaign to protect and restore Puget Sound's shorelines. This effort is led by the Alliance for Puget Sound Shorelines—a cooperative effort between TNC, The Trust for Public Land and People for Puget Sound—and will provide additional opportunities to engage the public and other partners in our efforts to restore habitat for native oysters, as well as long-term goals to improve water quality throughout the Sound.

- 2. *Project plan. Explain how the project meets the needs identified above by providing the following: project goals and objectives, activities, expected accomplishments, and timetable.***

Project Goals and Objectives

Goal 1. Restore ½ acre of intertidal habitat for native oysters

Goal 2. Refine methods for native oyster restoration

Objective 1: Monitor changes in the condition and quality of the oyster cultch over time (e.g. elevation about surface; amount covered by sediment or other organisms)

Objective 2: Quantify spatial and temporal variation in natural larval recruitment

Goal 3. Assess the biological value of newly created reefs

Objective 1. Quantify changes in the diversity and abundance of the benthic community

Timetable of Activities

- Baseline biological surveys (Oyster survey completed May 2008; other pre-restoration baseline surveys in May 2009)
- MOA with WDFW signed (May 2009)
- Cultch placement (July 2009)
- Annual effectiveness monitoring (2009-2011)
- Identification and implementation of corrective measures (Fall 2009/on-going)
- Expansion of restoration area if successful (2010)

Expected Accomplishments and Anticipated Benefits

This project will provide ½ acre of enhanced habitat for natural recruitment by Olympia oysters. Approximately 200 cubic yards of oyster cultch will be placed on site. Shell material will be brought in using small barges and boats. Work will be completed by Puget Sound Restoration Fund (under contract to The Nature Conservancy), TNC staff, and volunteers. Project monitoring will examine recruitment to the newly placed substrate as well as oyster survival and habitat conditions. Pending additional funding, monitoring will be expanded to include fish and mobile invertebrate use of the new substrate. Monitoring protocols have been developed by PSRF and are currently being used for the monitoring of our three other oyster restoration projects.

It is well documented that shellfish exert an important influence on the character and condition of the estuarine environment. They provide a three-dimensional structure and habitat for plant and animal life of all kinds, and play a particularly important role in the uptake and recycling of energy and nutrients. While clean water is critical to the shellfish industry, it is perhaps less well known the critical role that shellfish play in keeping clean the very waters in which they live. In the ecosystem, bivalve shellfish filter seawater at rates ranging between 6 and 26 gallons of water a day. Healthy populations of shellfish can filter a substantial fraction of an estuary's water on a daily basis, and in the process help regulate vital flows of nutrients in the overall system. The uptake and recycling of organic matter helps control

phytoplankton levels, improve water clarity, supply nutrients to bottom sediments and allow greater light penetration for the growth of seagrasses and other bottom vegetation. (Adapted from “An Abundance of Riches, Enjoying and Preserving Washington’s Shellfish Resources” Published by the Puget Sound Action Team.)

The relatively small size of this restoration project will preclude direct measurements of water quality changes, but it will help us develop and refine the methodology and expertise needed to complete shellfish restoration at a scale that can provide measurable water quality benefits at the local level. It will also help foster the critical partnerships between public agencies and private organizations that are needed to expand shellfish restoration to a scale capable of providing measurable water quality benefits. This is one of a handful of similar oyster restoration projects TNC is implementing in partnership with PSRF. Our long-term goal is to establish fully functioning natural shellfish beds in historic locations throughout Puget Sound. Funding this project would be a long-term investment in the health of Puget Sound and its water.

We predict that this project will provide direct benefits not only for native oysters, but for other benthic invertebrates such as worms and crustaceans, which are an important food source for crabs, oysters and multiple fish species including flounder, sole, and juvenile salmonids. As oyster populations increase, we also anticipate direct, but long-term benefits to water quality since oysters are filter feeders and concentrate many of the pollutants and pathogens from their surroundings.

3. *Project budget.*

	Requested PSA funds	In-Kind Contributions	TOTAL PROJECT COST
PERSONNEL	4,200	5,600	9,800
TRAVEL	800	-	800
SUPPLIES	2,000	500	2,500
CONTRACTUAL			
Restoration and planning	10,000	1,500	11,500
Monitoring	3,000	1,000	4,000
Shell purchase, transport and spreading	10,000	-	10,000
total contractual	23,000	2,500	25,500
TOTAL	30,000	8,600	38,600

** In-kind contributions are from TNC, WDFW and PSRF*

Budget Narrative for Requested Funds

Restoration and planning (\$11,500; Requested PSA funds of \$10,000; \$1,500 In-kind from WDFW) – Contract with PSRF including costs for planning, pre-restoration habitat surveys, boat/barge use, purchase, delivery and spread of shell. WDFW will provide technical guidance and an MOA.

Monitoring (\$4,000; Requested PSA funds of \$3,000; \$1,000 In-kind from PSRF) - Costs include post-restoration monitoring of oyster recruitment to shell material, oyster survival, core sampling/analysis for benthic invertebrates, shell condition, and identification of predators and other species in sample plots.

Shell (\$10,000; Requested PSA funds of \$10,000) – includes shell purchase, transport and spreading.